

**BEFORE THE HEARING PANEL OF THE FLORIDA JUDICIAL
QUALIFICATIONS COMMISSION
STATE OF FLORIDA**

INQUIRY CONCERNING A JUDGE,

SC 15-1746

HON. KIMBERLY MICHELE SHEPARD

No. 14-488

**JUDICIAL QUALIFICATION COMMISSION’S REPLY TO
RESPONDENT JUDGE SHEPARD’S RESPONSE TO ORDER TO SHOW
CAUSE**

I. Introduction.

This case comes before this Court for consideration of the Findings, Conclusions and Recommendations of the JQC entered on June 9, 2016, after a one- day trial. The Hearing Panel found Judge Shepard guilty of violations of two Judicial Canons and one Rule Regulating the Florida Bar, and recommended that the following discipline be imposed: a public reprimand, a 90-day suspension without pay, and payment of investigative costs, and costs of the proceedings. (Findings and Conclusions, p. 23).

The charges brought against Judge Shepard allege that, as an attorney in private practice, during a 2014 campaign for judicial office, she violated Judicial Canons 1, 2A, 7A(3)(b), 7A(3)(c) 7A(3)(d), and 7A(3)(e)(ii), and Rule Regulating the Florida Bar 4-8.2(b). The allegation common to all violations was that “during

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her campaign for election to judicial office, attorney Shepard circulated a deceptive, and misleading advertisement which implied that the *Orlando Sentinel* had endorsed Ms. Shepard in the judicial race, when it had, in fact, endorsed her opponent. The advertisement's language was taken from a 1994 endorsement of Ms. Shepard for a legislative race, without disclosing the date and office to which it applied. Moreover, Ms. Shepard purposefully removed several sentences that provided context to the 20-year old endorsement. (See, generally, Notice of Formal Charges filed in this Court on September 24, 2015, and Amended Notice of Formal Charges, filed in this Court on January 8, 2016). Judge Shepard filed an Answer and Affirmative Defenses to the Amended Notice of Formal Charges, but notably did not file a Motion to Dismiss at that time. The Hearing Panel heard testimony from witnesses offered by the JQC and by Judge Shepard, as well as testimony directly from Judge Shepard. At the conclusion of the trial, the Hearing Panel took the matter under advisement and subsequently issued the Findings, Conclusions and Recommendations now on review.

The Hearing Panel found Judge Shepard guilty of violations of Judicial Canons 7A(3)(B) and 7A(3)(e)(ii), not guilty of violations of Canons 7(A)(3)(c) and 7(A)(3)(d), and dismissed violations of Canons 1 and 2 (Findings and Conclusions, pp. 20-21).

II. Summary Of Hearing Panel's Findings

The Hearing Panel found Judge Shepard guilty of violating Canon 7A(3)(e)(ii) by “knowingly misrepresenting ‘other facts’ concerning her candidacy, and Canon 7A(3)(b) by acting in a manner inconsistent with the integrity of the judiciary by these knowing misrepresentations.” (Findings and Conclusions, pp. 20-21). The Hearing Panel, after receiving all of the evidence and testimony, concluded that Judge Shepard “. . . knowingly misled the public by campaign literature which implied that she was endorsed by the *Orlando Sentinel*, when this was untrue.” (Findings and Conclusions, p. 15); and that “(b)y knowingly deleting the 1994 date of the *Orlando Sentinel*’s endorsement, and all references to her legislative service, Judge Shepard made it appear that she had received the *Orlando Sentinel*’s endorsement, which was patently untrue.” (*Id.*, p. 19).

Based on these findings and a detailed analysis of appropriate discipline, the Hearing Panel recommended a public reprimand, 90-day suspension without pay, and costs. (*Id.* at p. 23).

The record conclusively supports the Findings and Recommendations. Accordingly, the JQC respectfully requests that this Court approve the Findings and Recommendations, and impose the discipline outlined therein.

III. Reply to Judge Shepard's Response to the Order to Show Cause.

On June 10, 2016 this Court issued an Order to Show Cause directing Judge Shepard to show cause why the recommendations of the Hearing Panel should not be followed. Judge Shepard sought an extension of time to reply in order to obtain counsel. On July 31, 2016 she filed her 87-page Response in which she for the first time raises challenges to the constitutionality of Canon 7A(3)(e)(ii). She also renews her due process challenges, and further challenges the Findings and Recommendations of the Hearing Panel.

The essence of the charge against Judge Shepard is that she produced and promulgated campaign literature that was materially misleading. The Hearing Panel concluded that the misrepresentation was intentional. Her response to the allegation was that it was, in fact, true that the Orlando Sentinel endorsed her and found that she had integrity. The fact that the endorsement was made in 1994, in a race for a legislative seat, and that the Orlando Sentinel endorsed her opponent in the current judicial race was of no consequence, because she maintained her "integrity." On page 2 of her Response she asserts, "The JQC then initiated these proceedings alleging that candidate Shepard's use of four **true** statements regarding Ms. Shepard's earned and established reputation for **character** and **integrity** was improper." (Emphasis in the original).

Ms. Shepard believed her opponent, Mr. Katz, to be unworthy of judicial office, and somehow convinced herself that this justified her actions. “In doing so, she knowingly misled the public by campaign literature which implied that she was endorsed by the Orlando Sentinel, when this was untrue.” (Findings and Recommendations p 15.)

In another JQC case which involved stating less than the whole truth, Judge Frank defended his action of asking another judge to help secure legal counsel for his daughter by arguing that he had never discussed his daughter’s case with the other judge because he never mentioned his daughter by name. This Court found that while it may have been “technically true” that he never mentioned her by name, that subtle distinction was insufficient to overturn the Hearing Panel’s Findings that Judge Frank had made a false or misleading statement when he said that he had “never discussed” his daughter’s case with the other judge. See *In Re Frank*, 753 So. 2d 1228 (Fla. 2000).

It should also be noted that the JQC does not accept many of the facts and assertions made throughout Judge Shepard’s lengthy Response to the Order to Show Cause. Indeed, the record conclusively refutes many of her assertions. However, Judge Shepard’s misstatements and exaggerations do not relate to the ultimate issue before the court, so the JQC will not address them further, except to

note that Judge Shepard is now applying the same kind of mischaracterizations and misdirection to defend herself, that attorney Shepard used to obtain office.

A. Constitutional Challenges to Canon 7A(3)(e)(ii).

Judge Shepard for the first time argues that Canon 7A(3)(e)(ii) fails to address a compelling state interest, that it is not narrowly tailored and that the integrity of the judiciary is a concept that is vague and overbroad. As stated in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002):

A candidate's speech during an election campaign “occupies the core of the protection afforded by the First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995). The proper test to be applied to determine the constitutionality of restrictions on “core political speech” is strict scrutiny. *Id.* Under strict scrutiny analysis, the government has the burden of proving that the restriction is “(1) narrowly tailored, to serve (2) a compelling state interest.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 2534, 153 L.Ed.2d 694 (2002); see also *Brown v. Hartlage*, 456 U.S. 45, 53-54, 102 S.Ct. 1523, 1529, 71 L.Ed.2d 732 (1982) (“When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.”).

In *Weaver v. Bonner*, the 11th Circuit found that although Georgia could demonstrate a compelling state interest in preserving the integrity, impartiality and independence of the judiciary and the integrity of the electoral process, Georgia’s

Canon proscribing misleading or deceptive statements made in a judicial election was not narrowly tailored to comport with the First Amendment.

The situation created by Judge Shepard's actions is quite different. First, the Hearing Panel disregarded the Respondent's testimony that she did not intend to mislead or deceive, and affirmatively found that Judge Shepard's active and intentional manipulation of an endorsement constituted a knowing misrepresentation. As recognized in *Weaver v. Bonner*, "false statements are not entitled to the same level of First Amendment protection as truthful statements. *Weaver* at 1319. The Florida Code of Judicial Conduct Canon 7A(3)(e)(ii) is much more narrowly drawn than the Georgia Code provision reviewed in *Weaver*.

Georgia's Canon 7(B)(1)(d) prohibited judicial candidates from "any form of public communication which the candidate knows or should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation or fact or law or omit a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve."

By contrast Florida Canon 7A(3)(e)(ii) states that a judicial candidate shall not "knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or opponent." Clearly the Florida Canon is narrowly tailored to serve a compelling state interest.

In reviewing the false statements clause in the Kentucky Code, the court in *Walter v. Wolnitzek* __ F.3d __ (11th Cir. 2016) 2016 WL 4446081 held:

False statements clause. This clause prohibits a judge or judicial candidate from “knowingly” or “with reckless disregard for the truth” making any “false [] statements” during a campaign. Canon 5(B)(1)(c). The Kentucky Supreme Court interpreted it to prohibit “untrue utterance[s]” that are “material[]” to a campaign, and to apply to Jones' request for voters to “reelect” her even though she was initially appointed to her post. See *Winter*, 482 S.W.3d at 776, 778–79. The clause is constitutional on its face. The narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly. In the words of the district court: “Don't want to violate the Canon? Don't tell a lie on purpose or recklessly.” R. 124 at 38. Given the mens rea requirement, a judicial candidate will necessarily be conscious of violating this canon. Cf. *Weaver v. Bonner*, 309 F.3d 1312, 1319–20 (11th Cir. 2002).

As recited in the Findings and Recommendations, Florida judicial disciplinary cases have consistently found that this Court will not tolerate misleading and inaccurate campaign activity. The concerns that echo from *Republican Party of Minnesota v. White*, 536 U.S. 756, 122 S. Ct. 2428, L.Ed.2d 694 (2002) as expressed in *In re Kinsey*, 842 So.2d 77 (Fla. 2003) do not pertain to this case.

B. Due Process and Clear and Convincing Evidence

Judge Shepard argues that she was not afforded due process during the discovery phase and at the final hearing.¹ Judge Shepard argues that her due process rights were violated in that she was denied a meaningful opportunity to obtain discovery. Specifically, she argues that she was denied access to "prior witness statements" of the JQC's hearing witnesses. FJQCR 12(c) specifies that, upon demand, Special Counsel shall furnish written witness statements and transcripts of testimony that are relevant to the subject matter of the hearing, and which are not otherwise confidential under the Constitution of the State. The JQC filed objections to the request to produce said documents, arguing that if any existed, they were confidential under the Constitution. Judge Shepard filed a Motion to Compel production of those documents. The Hearing Chair denied the motion. Judge Shepard then issued subpoenas *duces tecum* for deposition to two JQC witnesses, requiring the witnesses to produce any such documents in their possession. The JQC objected on the same grounds as the objection to the original request for production. The Hearing Chair sustained the objection to the *duces tecum* portion of the subpoenas. These concerns were extensively addressed in the Findings and Recommendations. The actions by the Chair comport with the duties imposed by the Commission rules. *In re Graziano*, 696 So.2d 744 (Fla. 1997).

¹ To the extent that her argument pertains to charges for which she was found not guilty, no response is given.

In considering whether there was clear and convincing evidence to establish the Hearing Panel's finding of fact, the proof is quite succinct and compelling. The Panel found:

After the Orlando Sentinel endorsed her opponent, Ms. Shepard distributed the campaign mailer at issue, referred to as JQC Ex.10. (T.44-45; 47-48). A copy of the original color mailer is attached. The front and back of the mailer compared Kim Shepard to her opponent in multiple categories. On the back, under the column for Kim Shepard it stated:

"Ms. Shepard has done well. She has kept her promises. She has worked hard. She has maintained her integrity."

- The Orlando Sentinel

This purported to be a direct quotation taken from the Orlando Sentinel, but significantly (1) omitted the 1994 date of the newspaper's endorsement; (2) omitted the fact that this statement was twenty years old, and made in connection with a 1994 legislative race, not the current judicial race; and (3) was substantially edited to delete all reference to Ms. Shepard's legislative service. Both the intervening sentence and end sentence of the paragraph of the Orlando Sentinel endorsement were removed without any indication. (JQC Exs.10; 12; T.42-43).

This Court reviews the findings to ensure that there is clear and convincing evidence to support the allegations. *In re Graziano*, 696 So.2d 744 (Fla. 1997). It is submitted that the foregoing clearly demonstrates a violation of the Canon.

With regard to Judge Shepard's various concerns about the propriety of evidentiary rulings, since the Supreme Court reviews the record and independently assesses the factual findings and recommendations, her concerns will be addressed

by the Court. *In re Graham*, 620 So. 2d 1273 (Fla. 1993), *In re Tauton*, 357 So.2d 172 (Fla. 1978).

C. Discipline

This Court has the discretion to accept, reject or modify the Commission's findings and recommendations of discipline. Although the Court gives those findings great weight, the ultimate power and responsibility lies with this Court. *In re Renke*, 933 So.2d 482 (Fla. 2006). And as recognized by the Hearing Panel, the *Renke* case shares similarities to the present action.

What is striking about this case is that Judge Shepard states without compunction that because the Orlando Sentinel endorsed her in a 1994 legislative race and commented on her integrity, she maintains, in contesting these charges, that "integrity is a quality ... you either have or you don't,"(T.55-56; 167-69), and Judge Shepard believes that this virtue is undiminished by time or circumstance. In spite of a favorable recommendation of only a public reprimand, a 90-day suspension, and the payment of costs, Judge Shepard continues to respond with overheated rhetoric, and irresponsible statements and representations. As found by the Hearing Panel:

Even with the benefit of hindsight, Judge Shepard was either unable or unwilling to answer "Yes" or "No" to the most basic questions regarding whether her mailer was misleading. (T.188-90). She apologized **only** "If anyone was misled," stating that "wasn't my intent." (T.180).

Likewise, her Response to the Order to Show Cause is remarkable in its length, formatting, and the steadfast denial of wrongdoing. While the Hearing Panel felt constrained by this Court's precedent, they did not have the benefit of her Response to the Order to Show Cause. Her Response is a verification of her belief that sinister forces are conspiring to usurp her position. As stated at page 22 of the Findings and Recommendations: "However, the Hearing Panel is seriously concerned about the Judge's inability to recognize or understand her inappropriate actions and reactions to these proceedings." The failure to appreciate the concerns of the JQC and appreciate the consequences of her conduct calls into question her ability to serve. "A judge who refuses to recognize his own transgressions does not deserve the authority or command the respect necessary to judge the transgressions of others. We are troubled by the fact that Graham shows no remorse and we can only presume that if this Court reprimanded him, he would continue to violate the precepts of the Code of Judicial Conduct." *In re Graham*, 620 So.2d 1273 (Fla. 1993).

The purpose of disciplinary proceedings is not for the purpose of punishment, rather it is to gauge the judge's fitness to serve as a judicial officer. *In re Kelly*, 238 So. 2d 565, 569 (Fla. 1970). Here Judge Shepard is unable or unwilling to see that her intentional use of an endorsement by the Orlando Sentinel from a 1994 legislative campaign in a 2014 judicial campaign flyer was

misleading. Her assertion that their opinion that she had integrity was a fact that she could use in spite of the paper's subsequent endorsement of her opponent itself undermines her claim of integrity.

In *In re Alley*, 699 So.2d 1369 (Fla. 1997), this Court reluctantly accepted the recommendation of the JQC for a public reprimand in an election violation case. It did so in part because the JQC was persuaded by Judge Alley's admission of the allegations, that she "had learned a great lesson and has been deeply sensitized to the need for judges and judicial candidates to show judicial demeanor and restraint when they are required to run in a contested campaign." *Alley* at 1369. Otherwise the misrepresentations in the campaign advertising constituted a "significant impediment to an orderly and truthful electoral process, and because they raise serious questions of personal and professional integrity." (e.s.). (*Alley* at 1340).

D. Conclusion

The clear and convincing evidence in this matter establishes that the factual Findings of the Hearing Panel should be confirmed. The Court should also consider Judge Shepard's approach to the disciplinary process. Although every responding judge or litigant should not be faulted or penalized for requiring that the case be proved against them, Judge Shepard's inability, or willful refusal to recognize the fact of the misrepresentation and how the misrepresentation could be

misleading arguably demonstrates a present unfitness for office either due to lack of integrity or a lack of capacity.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply has been furnished by electronic service to:

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